LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 13 1969
CLERK

No. 338

In the Supreme Court of the United States

OCTOBER TERM, 1969

NICHOLAS PANACCIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 333

NICHOLAS PANACCIONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on June 16, 1969. The petition for a writ of certiorari was filed on July 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court was required to grant petitioner's motions for a bill of particulars and discovery.

2. Whether the court of appeals properly decided not to apply in petitioner's case its determination, made in that case, that henceforth the so-called *Allen* charge is not to be given in the Third Circuit.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of possession of counterfeit money and aiding and abetting an attempted sale of the money, in violation of 18 U.S.C. 472 and 473. He was sentenced to imprisonment for concurrent terms of five years. The court of appeals affirmed (Pet. App. B).

The government's evidence showed that on June 18, 1965, in New York City, undercover Secret Service agent James D'Amelio was told by co-defendant Angelo Pepe that he had access to an unlimited amount of counterfeit money. D'Amelio offered to purchase $10,000 from Pepe's contact (R. 49a).[1] Thereafter Pepe informed D'Amelio that his contact agreed to the sale but insisted that it be made in Trenton, New Jersey (R. 50a-51a). On July 5, Pepe directed D'Amelio to board the 9:30 a.m. train to Trenton the following day, wearing a shirt of a particular color, and to proceed to the shoeshine stand at the depot, where he would meet the contact.

---

[1] Citations are to the one-volume Appendix, filed with the Clerk of this Court.

Following the directions, D'Amelio met co-defendant John Fioravanti at the shoeshine stand (R. 52a). Fioravanti took D'Amelio to the bar and there informed him that the price was $12 for each $100 of counterfeit money. Fioravanti then left the bar. When he returned, he told the agent to look for another man with a locker key. Shortly thereafter, petitioner entered the bar and sat on the bar stool next to Fioravanti (R. 53a). He produced a locker key from his right trouser pocket, and handed it to D'Amelio, saying that he should examine the money and pay for it if satisfied (R. 53a). In the locker D'Amelio found a quantity of counterfeit bills in a bag. He then gave a pre-arranged signal to surveilling agents, who arrested petitioner and Fioravanti (R. 53a, 86a).

In order not to expose D'Amelio's undercover role, the agents arrested him with the others (R. 56a, 135a). While they were confined in a detention room in the United States Marshal's Office, petitioner told D'Amelio that they would be "all right provided we help each other out on the bail" and that, if he had known that D'Amelio had come from New York, he would have delivered the money directly rather than operate through Fioravanti, who "had too much heat on him" (R. 68a).[2]

---

[2] These statements were not brought out by the prosecution, but were elicited on cross-examination by defense counsel. Petitioner has abandoned the claim made in the court of appeals that the conversation should have been stricken by the trial court as violative of *Miranda* v. *Arizona*, 384 U.S. 436 (Pet. App. 7a-11a).

Testifying for petitioner, Fioravanti [3] admitted that he had come to the train station to sell counterfeit money. He denied, however, that petitioner was involved in the crime. Fioravanti testified that he had asked petitioner, a mason, to meet him at the station to discuss certain masonry work; that when arrested petitioner was seated at the bar waiting for Fioravanti to complete his business with D'Amelio; that Fioravanti, not petitioner, furnished D'Amelio with the locker key; and that he was in a position to hear any conversation between petitioner and D'Amelio while awaiting arraignment, but that there was none (R. 169a-186a).

ARGUMENT

1. Prior to trial defense counsel filed a motion for a bill of particulars, requesting, *inter alia*, disclosure of the exact time, date, and location of the attempted sale, the specific acts performed by petitioner, and the manner in which the government would prove that petitioner knew the money was counterfeit (R. 11a-14a). In a subsequent motion for discovery under Rule 16, F. R. Crim. P., petitioner asked the court to order the government to disclose such information as written or recorded statements made by petitioner or his co-defendant, grand jury testimony, "any books, papers, documents, including paper currency, tangible objects, buildings, ships or places, or copies

[3] Prior to petitioner's trial Fioravanti had entered a plea of guilty to a charge of attempted sale of counterfeit money (R. 166a).

or portions thereof which are within the possession, custody or control of the Government," and all information helpful to petitioner obtained by the inquiry of federal agents (R. 15a-17a). At a hearing on the motions the court expressed some astonishment at the wide range of petitioner's demands, and asked whether counsel had some basis for his claims. Counsel declined to make any showing of a particularized need for the discovery he sought or to justify his requests in any way, insisting instead that he had an absolute right under Rule 16 to the items he requested (R. 26a). Government counsel told the court that he had no signed statements from petitioner or exculpatory materials and that petitioner had not testified before the grand jury. After some discussion the court denied both motions, with the exception of a request to clarify Count 6 (R. 42a-44a).

In this Court petitioner renews his assertion that he is routinely entitled to the discovery he requested under Rules 7(f) and 16.[4] The plain wording of those rules itself refutes this contention. The purpose of Rule 7(f) is to require the disclosure of those facts necessary to particularize the charge and prevent subsequent prosecution for the same offense. Even as revised, the rule does not require disclosure of the evidentiary details of the government's case. The determination of the need for a bill of particulars remains in the discretion of the district court.

---

[4] No issue is presented regarding the turning over of statements producible under 18 U.S.C. 3500. The record shows that such statements were given to petitioner's counsel at the appropriate time upon his demand (R. 70, 109-110).

That discretion was not abused in this case, where the indictment was plain, concise and definite. See *Nesson* v. *United States*, 388 F. 2d 603 (C.A. 1), certiorari denied, 391 U.S. 920; *Wyatt* v. *United States*, 388 F.2d 395, 397 (C.A. 10); *Wilkins* v. *United States*, 376 F. 2d 552, 562-563 (C.A. 5), certiorari denied, 389 U.S. 964; *Ross* v. *United States*, 374 F. 2d 97, 103-104 (C.A. 8), certiorari denied, 389 U.S. 882.

Nor was there any error connected with the denial of the motion made under Rule 16. That rule provides the court with discretion to order appropriate disclosures, but does not compel it to grant blanket requests for information. Petitioner in effect urges this Court to assert a "power to rewrite the Rules by judicial interpretations," a proposition rejected only last term. *Harris* v. *Nelson*, 394 U.S. 286, 298; see also *Miner* v. *Atlass*, 363 U.S. 641. In petitioner's case, the denial of the motion for wholesale discovery was not an abuse of discretion where no cause, relevance or particularized need was shown, and no reason was presented for believing that the government had the type of evidence sought. *Hemphill* v. *United States*, 392 F. 2d 45, 48 (C.A. 8), certiorari denied, 393 U.S. 877; *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408, 416 (S.D. N.Y.).

2. In its original charge before deliberations commenced, the court gave an instruction generally referred to as an "Allen Charge" (reprinted in full, Pet. 11a-12a), to which petitioner noted an objection. The court of appeals here reviewed the continuing validity of such a charge. Recognizing that this

Court had specifically approved a similar charge in 1896 (*Allen* v. *United States*, 164 U.S. 492), and had since denied review of countless challenges to the charge, the Third Circuit did not re-examine the constitutional question. Rather it held that, in the exercise of its supervisory authority over district courts in its circuit, hereafter the full *Allen* charge was not to be given either in the main body of instructions or in a supplemental charge, and that such a charge when given would be deemed error (Pet. 19a-20a). The court of appeals declined to apply its new ruling to petitioner's case, holding that in the context in which it was given, the *Allen* charge did not deprive petitioner of a fair trial or a unanimous verdict (Pet. 18a). This conclusion is fully justified by the facts of this case.

---

[5] The court approved the giving of a charge concerning the duty of jurors to consult with one another and suggested only that it would be considered error to instruct that a juror should distrust his own judgment if he is in the minority (Pet. App. 20a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

AUGUST 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 359560 91